**SUNRISE BHD & ANOR**

**v.**

**L & M AGENCIES SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-22-57-1996]
24 MAY 1999

***SALE OF GOODS:*** *Implied Conditions - Implied conditions as to quality or fitness - Breach of - What must be shown to prove breach - Sales of Goods Act 1957, s. 16(1)(a)*

***DAMAGES:*** *Action for - Onus of proof - Whether plaintiff must prove damages - Liability proved but damages not proved - Whether plaintiff entitled to damages*

***TORT:*** *Negligence - Economic loss - Claim for - Failure to plead negligence - Whether plea in negligence necessary to claim economic loss*

The 2nd plaintiff was the 1st plaintiff's main contractor. The 2nd plaintiff entered into an equipment sales agreement and a maintenance service agreement with the defendant to acquire two new tower cranes to facilitate the construction of two condominium blocks. The cranes frequently broke down and were inoperative for long periods of time. The 2nd plaintiff contended that the cranes were not reasonably fit for its purpose or that they were not of merchantable quality and thus relied on s. 16(1)(a) of the Sales of Goods Act 1957 ('the Act'). In the alternative, the 2nd plaintiff pleaded that the loss and damage suffered was caused by the negligence/breach of duty of the defendant. The 1st plaintiff in its pleadings based its claim for loss and damages suffered by the delay and prayed for general damages to be assessed but in its submission the 1st plaintiff argued for a claim based on pure economic loss. The defendant, meanwhile, contended that there was no condition or warranty as to fitness and instead counterclaimed for the outstanding sum due for services rendered and goods sold and delivered.

**Held:**

**[1]** By merely pleading "general damages to be assessed in respect of loss and damages suffered by the 1st plaintiff company", the 1st plaintiff is not entitled to launch a claim for pure economic loss by way of submission.

**[1a]** Economic loss has its origins in tort. The court will scrutinise the conduct of the defendant to see if there is any act or omission by him that is likely to give his conduct the characteristics of a tort. In this case, the only plea in negligence is a claim in the alternative by the 2nd plaintiff. There is no plea in negligence made by the 1st plaintiff against the defendant. On this ground alone the claim by the 1st plaintiff must fail.

**[2]** Four pre-conditions must be satisfied before s. 16(1)(a) of the Act could be applicable, they being: (i) the buyer must make known to the seller the particular purpose for which the goods are required; (ii) it must be shown that there was reliance by the buyer on the seller's skill and judgment, and the buyer must in fact rely on the seller to supply suitable goods; (iii) the goods must be of a description which is in the course of the seller's business to supply; and (iv) if the goods are specific, they must not be sold under their patent or trade name.

**[2a]** The first condition can be implied by the buyer making known to the seller either expressly or by implication the particular purpose for which the said two tower cranes were needed. Here, the defendant was at all times aware of the purpose of the cranes.

**[2b]** As for the second condition, if the defendant knows the purpose for which the plaintiff needs the particular goods, then it is clear that the plaintiff is relying on the seller's skill and judgment to supply suitable goods to cater for the particular purpose for which the goods were required.

**[2c]** As for the third condition, it is clear that the two tower cranes fitted the description of the goods which were sought for and supplied by the defendant. In fact, the defendant had admitted in cross-examination that the defendant was in the business of selling tower cranes.

**[2d]** As to the last condition, the mere fact that the tower cranes sold had a trade name and the fact that it was described in the contract by its trade name would not exclude the operation of the implied condition that the goods purchased shall be reasonably fit for the purpose for which it was acquired.

**[3]** The court accepts the evidence of the plaintiffs' witnesses in that the cranes supplied were faulty and thus, the 2nd plaintiff had indeed established a case against the defendant under s. 16(1)(a) of the Act. However, the 2nd plaintiff did not produce or keep any records of the alleged delay caused by the breakdown of the tower cranes. The 2nd plaintiff failed to establish the precise number of days of delay that can

be attributable to the defendant's breach and hence the court is unable to ascertain the actual number of days of delay caused directly by the defendant's fault. A plaintiff must know that not only is it its duty to prove liability, it has also to prove damages. Therefore, notwithstanding the fact that the 2nd plaintiff has proved its case against the defendant under s. 16(1)(a) of the Act, the court is unable to make any award of damages.

**[4]** As the defendant submitted evidence of the statement of account and invoices sent, its counterclaim is allowed with a deduction of a certain sum stated in vouchers which did not appear to refer to the two tower cranes.

*[Order accordingly.]*

**Case(s) referred to:**
*Baldry v Marshall [1925] 2 KB 260* ***(refd)***
*Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 CLJ 495* ***(refd)***
*Hardwick Game Farm v SAPPA [1968] 3 WLR 110* ***(refd)***
*Junior Book Ltd v Veitchi Co Ltd [1982] 3 All ER 201* ***(refd)***
*Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd [1995] 3 CLJ 171* ***(foll)***
*Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors [1985] 2 All ER 947* ***(refd)***
*Union Alloy (M) Sdn Bhd v Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd [1993] 3 CLJ 670* ***(foll)***

**Legislation referred to:**
Sales of Goods Act 1957, s. 16(1)(a)

*For the plaintiffs - R Kesavan (S Kumaran with him); M/s Md Tajuddin & Co*
*For the defendant - Joseph Yeo; M/s Joseph Yeo*

*Reported by Izzaty Izzuddin*

## JUDGMENT

**RK Nathan J:**

***Facts***

The 1st plaintiff is a developer and was responsible for the development of a mixed condominium and commercial development known as the Mont Kiara Pines (the said project). The 2nd plaintiff was at all material times a related company of the 1st plaintiff and was engaged by the 1st plaintiff as the main contractor for the construction of the said project. The 2nd plaintiff acquired two new tower cranes from the defendant to facilitate the construction of the

two condominium towers within the said project known as Scott and Everett Towers. The acquisition of the said two tower cranes from the defendant was subject to an equipment sales agreement dated 12 February 1991 and a maintenance service agreement dated 31 May 1991. Many meetings were held between the 2nd plaintiff and the defendant prior to the execution of both the said agreements.

The tower cranes purchased by the 2nd plaintiff from the defendant were manufactured in China under licence from the French Potain Company and known as Yangong-Potain Topkit F0/23B. The defendant admitted through one Chan Fook Meng (DW1) who represented the defendant both in the pre-agreement negotiations and in court, that the tower cranes sold were new. It is also undeniable that the defendant knew that the said tower cranes were required for the construction of the said project and that the 2nd plaintiff was the main contractor. The said tower cranes were brought in pieces and assembled on the 1st plaintiff's site sometime in July 1991 and the factories and machineries department's approval was subsequently obtained. The full purchase price of RM1,378,000 was paid by the 2nd plaintiff to the defendant for the said two tower cranes. The said two tower cranes were commissioned at the work site on 15 May 1991 and stationed at the Scott & Everett tower blocks of the said project.

***Plaintiff's Case***

The 2nd plaintiff's case is that the two tower cranes frequently broke down and were inoperable for long periods of time causing serious loss and delay in the completion of the said project. The plaintiffs contended that there was a 42-day delay.

The plaintiffs also contended that in breach of the sale and purchase agreement the tower cranes were not reasonably fit for the said purpose or that they were not of merchantable quality. The 2nd plaintiff thus relied on s. 16(1)(a) of the Sale of Goods Act 1957 (the Act).

The 2nd plaintiff also rested its case upon a breach of the preventive maintenance service contract for failing to provide trained and experienced technicians to service and to repair the defects in the said two cranes.

By a letter dated 18 March 1992 from its solicitors, the 2nd plaintiff notified the defendant through its then solicitors that the preventive maintenance service agreement was terminated and that the 2nd plaintiff would hold the defendant liable for the damages suffered by the plaintiffs. It is also the case of the 2nd plaintiff that because of the said 42-day delay in completing the project the 2nd plaintiff had to extend the services of its main sub-contractor, one Mivan Far East Sdn Bhd (Mivan) (formerly known as Spire Far East Sdn Bhd) and

claimed the sums it had paid to Mivan. Alternatively the 2nd plaintiff argued its case based on negligence and breach of statutory duty on the part of the defendant or its servants or agents.

In its pleadings the 1st plaintiff based its claim for loss and damages suffered by it consequent to the 42-day delay and prayed for general damages to be assessed. However, in its submission the 1st plaintiff argued for a claim based on pure economic loss.

***The Claim***

The 2nd plaintiff therefore claimed as follows:

1.(a) Additional costs of repairs and rectification works on the tower crane at Scott Tower amounting to RM62,749.06.

(b) Additional costs of repairs and rectification works on the tower crane at Everett Tower amounting to RM35,452.33.

(c) Additional costs of payments to Mivan for the extended completion of 42 days amounting to RM524,331.12.

2. Alternatively a claim based on negligence/breach of duty for the loss and damages suffered.

The 1st plaintiff claimed for damages arising out of pure economic loss.

Both parties prayed for interest and costs.

***The Defence***

The defence pleaded was that the said two tower cranes were sold as second-hand used cranes of Chinese make and that there was no condition or warranty as to fitness as alleged or at all. The defendant contended that the breakdowns if any were caused or contributed to by the acts and/or omissions on the part of the 2nd plaintiff and/or its servants or agents and alleged various particulars of negligence as against the 2nd plaintiff. Whilst denying the 2nd plaintiff's claim to negligence the defendant also argued that it owed no legal duty to the 1st plaintiff. The defendant also argued that there is no privity of contract between the 1st plaintiff and the defendant and that the 1st plaintiff had no *locus standi* to claim against the defendant.

***The Counterclaim***

The defendant thus counterclaimed for a sum of RM105,215.45 being the outstanding sum due for services rendered and goods sold and delivered to the 2nd plaintiff and also sought interest at the rate of 1.5% per month on

the said sum claimed to be calculated commencing 30 days after the invoices were dated and until full settlement with costs.

***Court's Findings***

**The 1st Plaintiff's claim**

I shall deal with the 1st plaintiff's claim of economic loss against the defendant. This claim although not pleaded as such in the statement of claim is only taken up in submission.

Firstly it is trite law that a defendant must know the case he has to face. By merely pleading "general damages to be assessed in respect of loss and damages suffered by the 1st plaintiff company" does not entitle the 1st plaintiff to launch a claim for pure economic loss, by way of its submission.

**Economic Loss**

The claim of economic loss has its origin in tort.

There are numerous ways whereby one party might interfere with another party's finance or property. Intentionally interfering with a person's business can give rise to a claim of passing off, of contract, of conspiracy to injure. However, a mere intention to inflict a business loss **"without anything more"** cannot be actionable for it is obvious that the very purpose one enters into competitive trade with others is to make a profit at the expense of one's rival. However, the court will scrutinise the conduct of the party to see if there is any act or omission, upon the conduct of the defendant that is likely to give his conduct the characteristics of a tort; this is what is meant by **"without anything more"**. A clear case of a claim for financial loss or economic loss is an instance where such loss is caused by an *ultra vires* administrative conduct, or where a solicitor's negligence causes loss to a person who is not a client or where a builder or manufacturer is sued by a subsequent purchaser for the cost of putting right a defect in a building. Case law is rife with authorities that show that a claim for economic loss is founded in tort.

But in this case the only plea in negligence as found in the pleadings is a claim in the alternative made on behalf of the 2nd plaintiff in negligence/ breach of duty as against the defendant. There is no plea in negligence made by the 1st plaintiff as against the defendant. In its submission the 1st plaintiff relies on "breach of the duty by the defendant" but unfortunately there is nothing pleaded as against the defendant in respect of this alleged breach of duty. On this ground alone this claim by the 1st plaintiff must fail.

**Remoteness**

Even if I were to consider this claim by the 1st plaintiff, I must also hold that it fails on the principle of remoteness. The 1st plaintiff contends that the 2nd plaintiff was its related company as there were common directors and common shareholders and no doubt this was supported from the extracts of the annual return of the 1st plaintiff and the share allotments and directorships of the 2nd plaintiff. It was because of this relationship that there was no written contract between the 1st plaintiff and the 2nd plaintiff. The 1st plaintiff's argument, that if it had sued the 2nd plaintiff for the delay it would seem improper as the parties were interrelated and allegations of manipulation and doctoring of records could be levelled against both the plaintiffs by the defendant and that in any event, surely if there had been a claim by the 1st plaintiff as against the 2nd plaintiff, the latter would have conceded to the claim, thus reinforcing the suspicions of conspiracy are totally unacceptable arguments. Even if the 1st plaintiff had indeed obtained consent judgment as against the 2nd plaintiff, by no stretch of the imagination can such consent judgment be enforced against the defendant. The 1st plaintiff when seeking recovery as against the defendant must still prove its claim as against the defendant.

Here there is clear admission by the 1st plaintiff that it had suffered no loss. There was no evidence of any claim made against the 1st plaintiff by the individual condominium purchasers. Whilst no doubt there exists the proximity relationship between both the plaintiffs as to tie the defendant into falling in line with the decision of the House of Lords in *Junior Book Ltd v. Veitchi Co Ltd* [1982] 3 All ER 201, yet that alone is insufficient. It was the case of the 1st plaintiff that if both the plaintiffs were not related companies there would have been a claim instituted for damages for late delivery against the 2nd plaintiff by the 1st plaintiff and that such damages would have been recoverable from the defendant. But the truth of the matter is there is no claim instituted against the 2nd plaintiff by the 1st plaintiff for late delivery and there is no way in which this court can therefore consider the eligibility of the 1st plaintiff to launch this claim by way of economic loss. There is no known loss suffered by the 1st plaintiff. I do not have to therefore even consider the evidence of PW6, the finance manager of the 1st plaintiff, in respect of such alleged loss. Even if I were to consider the evidence of PW6, his evidence is purely based on suppositions. He testified that the 1st plaintiff suffered loss caused by the delay because payments by purchasers are usually progressive and therefore any delay on the part of the 2nd plaintiff in getting the works certified by the architect would mean that the 1st plaintiff would not be able to receive the progress payments from the purchasers. Surely such evidence if existing could have been easily available to the 1st plaintiff who

could have tendered as an agreed document the details of the progress payments of its purchasers showing any late payment, if any. Again he testified that 10% of the purchase price usually paid upon signing of the agreement, is also not paid progressively. But again there is no evidence of this. He gave guess-work evidence of the interest paid by the 1st plaintiff on the financial facilities it had obtained for the project. He said the interest rate was in the region of 10.5%. He also guessed that the prevailing interest rates for fixed deposit during that period was between 6-8% p.a. I reject his computation of the 1st plaintiff's loss at RM18,540.05 per day which based on the 41-day delay, he computed at RM760,141.99. I therefore dismiss the 1st plaintiff's claim as against the defendant with costs.

**The 2nd Plaintiff's Claim**

*Section 16(1)(a) of the Act*

The said section reads as follows:

> 16. Implied condition as to quality or fitness.
>
> (1) Subject to this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows –
>
> (a) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be reasonably fit for such purpose:
>
> Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.

The 2nd plaintiff relied on this section on the basis that the said two tower cranes were purchased and that the express terms and conditions of the purchase are clearly spelt out in the equipment sales agreement dated 12 February 1991 and the maintenance agreement dated 31 May 1991.

In s. 16(1)(a) there would be an implied condition that the goods purchased shall be reasonably fit for the purpose for which it was acquired. Summarising the provisions of the said section, Zakaria Yatim J (as he then was) held in *Union Alloy (M) Sdn Bhd v. Sykt Pembenaan Yeoh Tiong Lay Sdn Bhd* [1993]

3 CLJ 670; [1993] 3 MLJ 167 that there were 4 pre-conditions which must be satisfied before s. 16(1)(a) of the Act could be applicable. He itemised the said 4 pre-conditions as follows:

(a) The buyer must make known to the seller the particular purpose for which the goods are required;

(b) It must be shown that there was reliance by the buyer on the seller's skill and judgment, and the buyer must in fact rely on the seller to supply suitable goods;

(c) The goods must be of a description which it is in the course of the seller's business to supply; and

(d) If the goods are specific, they must not be sold under their patent or trade name.

As found by the learned judge in *Union Alloy*, I too am of the view that condition (a) which relates to the particular purpose for which the goods are required can be implied by the buyer making known to the seller either expressly or by implication the particular purpose for which the said two tower cranes were needed. I accept the evidence of the plaintiffs' witnesses, namely, PW3, PW4 and PW5, that they had at all times during the negotiations, informed DW1, the defendant's representative, that the tower cranes were required for the construction of the condominium towers at the project. In fact it was a condition of the sale of the tower cranes that the defendant would be responsible for the commissioning of the tower cranes and obtaining the approval from the factories and machineries department. Although the 2nd plaintiff was only incorporated on 22 January 1991 the parties involved in the negotiations were from the 1st plaintiff and seconded to the 2nd plaintiff on incorporation.

As for the 2nd pre-condition relating to "reliance by the buyer of the seller's skill and judgment", I also accept the view expressed by Zakaria Yatim J (as he then was) when he accepted Lord Pearce's views in *Hardwick Game Farm v. SAPPA* [1968] 3 WLR 110 at 115 wherein the latter said:

> ... The whole trend of authority has inclined towards an assumption of reliance wherever the seller knows the particular purpose ...

To my mind it is nothing more than common sense. If the defendant knows the purpose for which the plaintiff needs the particular goods then it is clear that the plaintiff is relying on the seller's skill and judgment to supply the suitable goods to cater for the particular purpose for which the goods were required. There is no doubt in my mind that the defendant well knew that the 2nd plaintiff wanted the tower cranes to facilitate the construction of the

condominium tower blocks at the project. The defendant also well knew that the sole purpose of the tower cranes was the vertical transportation of materials and equipment to the upper construction site to facilitate the building of the tower blocks. PW1's expert evidence on this is very clear.

With regard to pre-condition (c) it is clear from the pre-sale negotiations and the brochure from the defendant, that the 2 tower cranes fitted the description of the goods which were sought for and supplied by the defendant. In fact DW1 readily admitted in cross-examination that the defendant was in the business of selling tower cranes. As to the pre-condition (d), it is my judgment that the mere fact that the tower cranes sold had a trade name and the fact that it was described in the contract by its trade name of Yangong-Potain, would not exclude the operation of the implied condition. In *Union Alloy* Zakaria Yatim J (as he then was) accepted and adopted the speech of Sargant LJ in *Baldry v. Marshall* [1925] 2 KB 260 at p. 270 wherein his Lordship said as follows:

> The proviso rather applies to a 'sale of a specified article under its patent or other trade name', and it seems to me that the sort of mischief it was intended to prevent was this: It is well known that patent medicines and articles sold under trade names are often sold under puffing or laudatory names, which imply that the article will perform a definite function satisfactorily. Suppose a hosier were to offer for sale some hose as 'holeproof hose', and a purchaser were to send him an order for holeproof hose, I think it is clear that the purchaser would under ordinary circumstances be relying on the skill and judgment of the vendor to sell him an article which would have the quality implied in its name. But if there is on the market a well-known article known as holeproof hose, then it seems to me that the proviso is aimed at preventing an order of that article under its laudatory name from raising the implication that the buyer is asking the seller to supply him with something which will fulfil the requirements indicated by the name. I do not say that that is the only purpose of the proviso, but I think it is the main purpose.

This passage very succinctly describes the applicability of the two tower cranes for the purpose of the project which was to transport materials to the required height. In so far as the 2nd plaintiff is concerned it is well content and rests assured that the defendant had bought the right goods and of good quality. I am of the view that since the plaintiffs were familiar with the French-made Potain tower cranes and since they were informed that these China-made Yangong-Potain cranes were made in China under licence, the plaintiffs were entitled to assume that the said two tower cranes were of similar merchantable quality. In any case in respect of the proviso to s. 16(1)(a) of the Act the Court of Appeal in *Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd* [1995] 3 CLJ 171; [1995] 2 MLJ 257 held that the plaintiffs had relied on the defendants' skill resulting in there being an implied condition that the

machines would be reasonably fit for the purposes for which they were required and that the situation in the said case was a far cry from the purchase of a common article sold under a popular brand name which is picked off the shelf, and which is the sort of situation wherein the proviso under s. 16(1)(a) of the Act could be invoked. In fact the plaintiffs relied on the assurances of DW1 that after replacing the various electrical components the said 2 China-Potain tower cranes would be reliable and be of similar quality as that of the French-made Potain tower cranes. In fact by their letter dated 6 October 1990 (see 1 CABD 31) the defendant confirmed that all fuses would be replaced with circuit breakers when the crane would arrive in Singapore. I therefore have no hesitation in holding that the 2nd plaintiff had relied on the seller's skill in that upon replacement of certain electrical parts the tower cranes would be reliable and thereby raising an implied condition that the said two tower cranes would be reasonably fit for the purpose for which they were required.

I have no hesitation in accepting the evidence of PW1, Lesley Peter Shaw, a registered Electrical Inspector from New Zealand, called by the plaintiffs as an expert to testify with regard to the cranes. He had inspected the two tower cranes. He confirmed having worked extensively on tower cranes in New Zealand, Australia, Fiji, Singapore, Malaysia, Thailand and Vietnam and had also worked with various different makes of tower cranes. He confirmed preparing a report although the introduction and closing paragraphs of the said report were written by someone else. However, the technical details in the report were written by him.

This witness confirmed that he was of the opinion that the tower cranes were second-hand stuff based on the general deterioration of the cranes in common with previous use and further there was paint damage, rust, corrosion, parts were broken and parts missing. This witness categorised eight major problems after inspecting the tower cranes. They were:

(1) Wrong transformer installed in the cabin control panel which meant that the tower cranes were working on the wrong voltage different from that specified by the manufacturer.

(2) The weather vane system would not work.

(3) The crane drives could not select the 3rd speed "In" for the trolley which meant that the second speed was being used in excess of normal operation, contributing to overheating of the trolley motor and slowing down the operation of the crane.

(4) 2 of the 3 phase terminations of the main supply cables were burnt and was intermittently short circuiting between the metal parts of the terminals.

In effect because of this problem, the cable was under strain and severely stressed by the incomplete cabin entry ladder and could result in severe damage to the hoist electrical components, damage to the main cables and hoist operations failure. The phase imbalance may also result in a burnt-out motor.

(5) There was a burnt-out short circuited resistor in the hoist speed control circuit. There was a wire wound resistor connected across the diode bridge which could cause the failure of the hoist speed control.

(6) The electrical protection and safety device was by-passed and because of this the crane would be prone to overheating problems.

(7) The hoist motor was overheating when the tower cranes were in operation and the motors smelled to be very hot.

(8) The wiring in the hoist control was burnt and short circuited and could result in the tower cranes being inoperable.

PW1 explained and I accept that the defects in the tower cranes meant that their operations would be considerably reduced in efficiency by the "downtime" caused by trip outs due to the overheating and not counting of course the time lost due to the resultant repairs and subsequent maintenance. There was no challenge from the defendant's own operators of the cranes to PW1's evidence that the tower cranes were poorly maintained and that the persons involved in the setting up of the cranes did not fully understand the electrical systems and that the mechanical cooling system and overheating motor problems were design flaws which did not work as required in the ambient temperature at the site with a reading of 30ºC. I also accept PW1's unchallenged evidence that the Chinese made Potain tower cranes were not as well constructed mechanically nor electrically as the French built cranes. In respect of the tower cranes he had inspected there was evidence of poor welding and distorted mast panel fabrication, and that the hoist motors' overheating problem was an indication of poor design and manufacture. He also established that there was hoist gearbox noise and vibration and indications of a bent hoist drum shaft which he opined emanated from poor construction. Under cross-examination he maintained that his inspection was carried out after the said two tower cranes had been in use for about six months. He maintained that the length of time of use and the frequency of use would have no effect in assessing the workability of tower cranes, but the quality of the parts, the manner of the operations of the tower cranes and their maintenance would affect their performance. In respect of the 8 problems he had earlier identified, he maintained that items 1 and 3 would make the crane operate poorly or inefficiently. Items 4, 6, 7 and 8 would render the crane inoperable whereas

item 5, although not rendering the tower cranes inoperable would cause difficulty for the driver to control it. Since the condition of the tower cranes was so bad, he opined that they were second-hand tower cranes. This testimony was not challenged.

DW1 was subjected to serious cross-examination regarding the maintenance work carried out by the defendant. If this was indeed so, I fail to understand why the defendant did not call any of its technicians to show proof of consistency of maintenance. Although reference was made by DW1 to the existence of technical personnel of the defendant, yet none was called. In any case the only witness called, namely, DW1, admitted that he was not an expert in tower cranes and was only involved in the sales and was partly involved with the maintenance.

PW2, the group maintenance manager of the 1st plaintiff and who was seconded to the 2nd plaintiff to take charge of the maintenance work in respect of the development of the said project testified that the two China-made Potain tower cranes at the Scott and Everett Towers were always giving problems. He also testified that the said tower cranes frequently broke down and that the response time from the defendant in respect of general maintenance and repairs were inadequate and that the electrical circuits tripped and that the motors were always giving problems. He also confirmed having sent numerous letters of complaints to the defendant, which letters he identified in the Common Agreed Bundle of Documents (CABD). PW3, a civil engineer by profession, testified for the plaintiff that despite the preventive maintenance service contract with the defendant, the defendant had delayed in sending the repair crew to make good the repairs to the cranes and even when they came, the said technicians who attended to the repairs could not handle the problem. That was why the said agreement was terminated.

Finally, I must point out that whilst DW1 led evidence that the two tower cranes were new the defence pleaded states that "the tower cranes were sold as second hand used cranes of Chinese make and there was no condition or warranty as to fitness as alleged or at all". The defendant's evidence, totally contradicts the pleaded defence. I am satisfied that the 2nd plaintiff has indeed established a case against the defendant under s. 16(1)(a) of the Act.

**Can The 2nd Plaintiff Also Sue In Tort?**

In its statement of claim the 2nd plaintiff stated in para. 24 as follows:

> 24. In the alternative, the loss and damage suffered by the second plaintiff was caused by the negligence/breach of duty of the defendants, their servants or agents.

**PARTICULARS**

(1) The defendant company failed to ensure that the tower cranes provided were of suitable quality for the construction of the tower blocks.

(2) The technicians provided under the maintenance contract were not sufficiently trained or skilled to handle the breakdowns suffered in the tower cranes.

(3) The service technicians failed, neglected or refused to carry out their duties.

(4) The service technicians failed to make prompt repairs and rectification.

Having so pleaded, the 2nd plaintiff submitted that in the light of the defendant's full knowledge of the use of the tower cranes purchased from the defendant, the defendant could reasonably have foreseen the damage that the 2nd plaintiff would suffer in the event the tower cranes supplied were not of good quality and not maintained properly. This imposed a proximity direct enough to impose a duty of care by the defendant to the 2nd plaintiff.

In response to this the defendant referred the court to the Privy Council decision in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* [1985] 2 All ER 947 PC and repeated the words of Lord Scarman at p. 957 which reads:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in *Lister v. Romford Ice and Cold Storage Co Ltd* [1957] 1 All ER 125 at 139, [1957] AC 555 at 587. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliff said:

> Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since, in modern times, the relationship between master and servant, between employer and employee, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.
>
> Their Lordships do not, therefore, embark on an investigation whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than that recognised in *Macmillan* and *Greenwood* can be implied into the banking contract in the absence of express terms to that effect, the respondent banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted.

The defence thus argued that based on this decision it would be wrong for the 2nd plaintiff to mix its causes of action with tort when what the 2nd plaintiff essentially is seeking is a contractual remedy.

To my amazement, counsel for the 2nd plaintiff readily conceded to his submission relying upon *Tai Hing Cotton Ltd* that "the 2nd plaintiff cannot proceed in tort against the defendant". I do not think that Lord Scarman intended to state that where there is a contractual relationship existing between two parties, their respective remedies lie in contract and not in tort. It is just that as a point of avoiding confusion the Privy Council did not wish to embark upon an investigation as to whether there can also be a cause of action in tort when the relationship seems clearly indicative of a contractual liability. That there can also be consideration towards obligations similarly arising in tort is shown by the readiness of their Lordships to confine the mutual obligations arising in tort, to be no "greater than those to be found expressly or by necessary implication in their contract".

In the light of the 2nd plaintiff's concession and subsequent abandonment of its claim in tort I shall make no further comment on this issue.

**The Loss Suffered By The 2nd Plaintiff**

The 2nd plaintiff contends that because of the breach of s. 16(1)(a) of the Act the tower cranes were rendered inoperable for a total of 41 days and this resulted in losses to them. PW3, the project manager of the 1st plaintiff and

who was seconded to the 2nd plaintiff upon the latter's incorporation, informed the court that the 2nd plaintiff appointed Mivan (formerly known as Spire Far East (M) Sdn Bhd) as the main contractor for the project.

PW3 testified that clause 7.1 of the agreement read together with Part 5 of the appendix governs the computation of payments based on the unit price in the bill of quantities for each tower sub-contracted would be reduced by 1/6th of 1 sen for each day of delay, and that there would be a fixed down time compensation of RM2,200 per day for Mivan for overheads incurred on the formwork equipment.

PW3 also testified that there was a final payment certificate no. 18 in respect of the contract between the 2nd plaintiff and Mivan. He also explained that variation order No. 4 was for the purpose of paying compensation to Mivan for the delay caused in completing the project. PW3 referred to Mivan's letter dated 24 February 1996. The total number of days of delay was agreed at 64 days and amounted to a sum of RM963,833.80 for Scott and Everett Towers and this amount was reduced to RM817,706.88 which was paid by a variation order no. 4. PW3 further testified that out of the 64 days' delay 41 days were attributable to the tower cranes and this was based on the summary provided by Mivan. He also testified that after receiving the claim by Mivan he proceeded to check with the 2nd plaintiff's site record and confirmed personally that 41 days were attributable to the down time in the tower cranes. The 2nd plaintiff merely submitted that the 2nd plaintiff paid Mivan compensation amounting to RM523,843.47 and that therefore for 41 days' delay the average was at the rate of RM12,776.67 per day of down time.

I am at a loss to understand how counsel arrived at this figure. No reference has been made to any payment or voucher in the 6 volumes of CABD relating to the sum of RM523,843.47. It is totally improper to make such a submission without guiding the court.

The main complaint of the 2nd plaintiff was the alleged frequent breakdown of the cranes. In its statement of claim the 2nd plaintiff set out the particulars of delay and alleged that between November 1991 to 19 January 1992 there were 42 days of delay which they attributed to the breakdown of the tower cranes. It is to be noted that the said particulars were extracted from the records kept by Mivan. However, under cross-examination PW2, the maintenance manager, testified that in respect of the tower crane at the Scott Condominium site according to the records kept by Mivan a total of 15 days were attributable to crane breakdown for the month of November 1991 to January 1992 and for the tower crane at the Everett Condominium, the total number of days was 14.

I find that the 2nd plaintiff did not produce or keep any record of the alleged delay caused by the breakdown of the tower cranes. The 2nd plaintiff chose to rely on the records kept by Mivan and yet the 2nd plaintiff failed to call anyone from Mivan to testify in respect of the said records. This is all the more relevant when the particulars of delay pleaded in the statement of claim are different from the amount of days of delay admitted in court.

In *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors* [1993] 2 CLJ 495; [1993] 2 MLJ 76 the then Supreme Court held that:

> The consequences of a breach of contract are governed by s. 74 of the Contracts Act 1950, which states:
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, **or** which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

However it is my judgment that the 2nd plaintiff has failed to establish the precise number of days of delay that can be attributable to the defendant's breach. To illustrate, at 2 CABD 105 Mivan made a claim of six days' delay for the period from 2 November 1991 to 24 November 1991 in respect of the Scott Block, yet it is obvious from a perusal of the said document that out of the six days' delay only three days have been attributed to tower crane breakdown.

This court is therefore unable to ascertain the actual number of days of delay caused directly by the defendant's fault and further this court is unable to accept the plaintiffs' quantification of the sum of RM523,843.47 in the absence of satisfactory proof of how they arrived at that figure. Even if that sum is hidden somewhere in the labyrinth of the 6 volumes of agreed documents it has not been shown to me how much of loss is to be calculated per day. The 2nd plaintiff's arbitrary division of the sum of RM523,843.47 by 41 days to arrive at RM12,776.67 loss per day is unacceptable.

In respect of the other 2 claims amounting to RM62,749.06 and RM35,452.33 being the sums claimed as rectification costs, under the equipment sales agreement the warranty period against manufacturer's defects was 12 months from the date of receipt of the written consent from the factories and machineries department. In respect of parts which are required to be replaced through normal wear and tear and consumable items such as fuses, the 2nd

plaintiff has to bear its own costs. There is no evidence before me as to which item comes under normal wear and tear or whether such rectified items fell within the warranty period. I have been shown a number of payment vouchers and I have been asked to make these awards. It is trite law that a plaintiff must know that not only is it its duty to prove liability, it has also to prove damages. Merely showing that it had made payment of the sum claimed to a third party and based on that payment, seeking to claim from the defendant the said full sum are two different issues. The defendant herein is entitled to challenge the various payments made. As I said there has been no proper itemising of the sums paid.

Having considered the case of the 2nd plaintiff much as I sympathise with the 2nd plaintiff, I am unable to make any award of damages, notwithstanding the fact that the 2nd plaintiff has proved its case against the defendant under s. 16(1)(a) of the Act. In the circumstances I order that each party is to pay its own costs of the main action.

***The Counterclaim***

In its counterclaim the defendant claims a sum of RM105,215.45 together with interest at 1% p.m. The statement of account is set out clearly at 3 CABD 206-207. Each invoice is clearly identified in 4 CABD and 7 CABD. The 2nd plaintiff has pointed out vouchers amounting to RM16,010.60 which do not appear to refer to the 2 tower cranes in question. I accept this and therefore deduct the sum of RM16,010.60 and give judgment for the balance amounting to RM89,204.85. There will be a flat interest at 4% from date of filing the counterclaim to date of judgment and costs.